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VOICENET COMMUNICATIONS, INC., et al. v. THOMAS W. CORBETT, JR., et al.

CIVIL ACTION NO. 04-1318

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2006 U.S. Dist. LEXIS 61916

August 30, 2006, Decided

PRIOR HISTORY: *Voicenet Communs., Inc. v. Pappert, 126 Fed. Appx. 55, 2005 U.S. App. LEXIS 3969 (3d Cir. Pa., 2005)*

COUNSEL: **[*1]** For VOICENET COMMUNICATIONS, INC., ON BEHALF OF ITSELF AND ITS SUBSCRIBERS, Plaintiff: ELLEN C. BROTMAN, JOHN ROGERS CARROLL, CARROLL & BROTMAN, PHILADELPHIA, PA.

For OMNI TELECOM, INC., ON BEHALF OF ITSELF AND ITS SUBSCRIBERS, Plaintiff: ELLEN C. BROTMAN, CARROLL & BROTMAN, PHILADELPHIA, PA.

For MICHELE L. DEERY, SPECIAL AGENT OF THE OFFICE OF ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, IN HER INDIVIDUAL CAPACITY, Defendant: SUE ANN UNGER, OFFICE OF THE ATTORNEY GENERAL, PHILADELPHIA, PA.

For G. MICHAEL GREEN, DISTRICT ATTORNEY OF DELAWARE COUNTY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, Defendant: ANDREW B. ADAIR, DEASEY MAHONEY & BENDER, LTD., PHILADELPHIA, PA; WILLIAM F. HOLSTEN, HOLSTEN & ASSOCIATES, MEDIA, PA.

For DIAN E. GIBBONS, DISTRICT ATTORNEY OF BUCKS COUNTY, IN HER INDIVIDUAL AND OFFICIAL CAPACITIES, MARTIN MCDONOUGH, DETECTIVE, BUCKS COUNTY DISTRICT ATTORNEY'S OFFICE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, THOMAS THIEL, DETECTIVE, BUCKS COUNTY DISTRICT ATTORNEY'S OFFICE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, Defendants: CHRISTIN E. CONNOLLY, FRANK A. CHERNAK, BALLARD SPAHR ANDREWS & INGERSOLL LLP, PHILADELPHIA, PA; LORENA E. AHUMADA, **[*2]** BALLARD SPAHR ANDREWS & INGERSOLL, LLP, PHILA, PA.

For THOMAS W. CORBETT, JR., ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA IN HIS OFFICIAL CAPACITY, Defendant: SUE ANN UNGER, OFFICE OF ATTORNEY GENERAL, LITIGATION SECTION, PHILADELPHIA, PA.

JUDGES: Mary A. McLaughlin, J.

OPINION BY: Mary A. McLaughlin

OPINION:

MEMORANDUM AND ORDER

McLaughlin, J.

The plaintiffs, Usenet newsreader and internet service providers, have sued several Commonwealth and local law enforcement officials under *42 U.S.C. § 1983* for violations of their constitutional and statutory rights in connection with the execution of a search warrant on the plaintiffs' premises on January 21, 2004. n1 The defendants have moved to dismiss counts II through VI of the complaint, which allege deprivations of rights under the Communications Decency Act, *47 U.S.C. § 230* ("CDA"); the Electronic Communications Privacy Act ("ECPA"), Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.); Pennsylvania's Internet Child Pornography Law, *18 Pa. C.S. § 7621 et seq.* ("ICPL"); the Commonwealth Attorneys Act, **[*3]** *71 Pa. C.S. § 732-101 et seq.*; and the *Fourth* and *Fourteenth Amendments*. n2

n1 The plaintiffs have voluntarily dismissed their claim for civil rights conspiracy under *42 U.S.C. § 1985* (count VII). (Jan. 27, 2006 Hr'g Tr. at 13.)

n2 The defendants have not moved to dismiss count I, for deprivation of freedom of speech under the *First* and *Fourteenth Amendments*, or count VIII, for violation of the *Commerce Clause*. These claims go forward.

The Court will grant the defendants' motion in part, and deny it in part. Specifically, the Court will dismiss the plaintiffs' due process claims based on alleged violations of the ICPL and the Commonwealth Attorneys Act. The Court will also dismiss the plaintiffs' ECPA claim. The CDA claim may go forward, but only to the extent that the plaintiffs seek declaratory or injunctive relief; the defendants are entitled to qualified immunity from damages because the plaintiffs' rights under the CDA were not clearly established **[*4]** at the time of the alleged violation. The *Fourth Amendment* claim may go forward because it is too early for the Court to determine whether all of the defendants reasonably relied on the search warrant in question.

I. Facts

The Court set forth the facts as alleged in the complaint in its July 15, 2004, Memorandum and Order denying the plaintiffs' motion for a preliminary injunction, and incorporates that discussion herein. n3

n3 When considering a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court accepts all facts and allegations listed in the complaint as true and construes them in the light most favorable to the plaintiff. *H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)*; *Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989)*. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*.

[*5]

II. Analysis

To state a claim under *§ 1983*, a plaintiff must allege the violation of a right secured by the Constitution or laws of the United States, and show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)*. The questions presented in this motion to dismiss are whether the plaintiffs have alleged a deprivation of rights under the CDA, the ECPA, and/or the *Fourth* and *Fourteenth Amendments*. The defendants do not dispute that they were acting under color of state law.

A. Count II - Deprivation of Rights Under the Communications Decency Act

The CDA provides, in relevant part: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *47 U.S.C. § 230(c)(1)*. The CDA further provides: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *47 U.S.C. § 230(e)(3)*.

In count II of the complaint, the plaintiffs allege that the **[*6]** defendants violated their rights under the CDA by enforcing against them *18 Pa. C.S. § 6312*, a state statute that criminalizes the knowing distribution and possession of child pornography. (Compl. PP52, 77.) The defendants have moved to dismiss count II on the grounds that: 1) the CDA does not confer an enforceable right, privilege, or immunity within the meaning of *§ 1983*; and 2) to the extent that the CDA does confer an enforceable right, it provides immunity from only civil, not criminal, liability.

Despite the defendants' arguments, the Court is persuaded that the plaintiffs have stated a *§ 1983* claim based on a violation of their rights under the CDA. The Court finds that all of the defendants are entitled to qualified immunity from money damages, however, because the plaintiffs' rights were not clearly established at the time of the actions giving rise to this litigation.

1. The CDA Confers an Enforceable Right, Privilege, or Immunity Within the Meaning of *§ 1983*

A plaintiff asserting a *§ 1983* claim based on a violation of a federal statute must show that the statute confers an enforceable right, privilege or immunity within the meaning of **[*7]** *§ 1983*. *Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990)*. A federal statute confers a right that presumably can be enforced through *§ 1983* when three conditions are met:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.

Blessing v. Freestone, 520 U.S. 329, 340-341, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997) (internal citations omitted). n4

n4 Even if the plaintiff satisfies these three conditions, the defendant can rebut the presumption of enforceability by showing that Congress precluded *§ 1983* remedies, either expressly, or implicitly, by creating a comprehensive enforcement scheme that would be incompatible with *§ 1983* remedies. *Id. at 341*. The defendants have not argued that Congress has precluded *§ 1983* remedies in the CDA.

[*8]

The defendants do not dispute that the CDA provisions in question are intended to benefit the plaintiff. n5 Nor do the defendants argue that the right created by the CDA is too "vague and amorphous" for a court to enforce. The defendants argue only that the CDA does not impose any binding obligations on the State, i.e. the defendants, because it merely provides an affirmative defense.

n5 The defendants assumed, for the purposes their motion, that the plaintiffs were an "interactive computer service" under the CDA. (Defs.' Mot. to Dismiss Br. at 11 n. 5.)

The defendants cite to two decisions by Courts of Appeals in other circuits that refer to the CDA as an "affirmative defense," *Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003)*, and *Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997)*. These decisions do not address whether the CDA creates a right that can be enforced through *§ 1983*, however. Even if the Court agrees that the CDA can be used as an affirmative defense, **[*9]** the question remains -- does the CDA also impose a binding obligation on the defendants?

In *Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989)*, the Supreme Court held that a statute that "denies [a] sovereign the authority to abridge a personal liberty" imposes a binding obligation on the State. *Id. at 112*. In that case, the defendant city refused to renew the plaintiff taxicab company's franchise unless the company settled its labor dispute with its union. The company brought suit under *§ 1983*, alleging that the city's actions violated the National Labor Relations Act ("NLRA"). *Id. at 104*.

The Court noted that the text of the NLRA did not explicitly demand any duties of the State. In an earlier case, *Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976)*, however, the Court had found that the NLRA gave parties to a collective-bargaining agreement the right to bargain with each other "free of governmental interference," thus creating a "free zone from which all regulation, whether federal or state, is excluded." *Golden State Transit, 493 U.S. at 110-111* **[*10]** (internal quotations omitted). The Golden State Transit Court described the Machinists rule as "akin to a rule that denies either sovereign the authority to abridge a personal liberty;" unless and until Congress decided to retract that statutorily-conferred liberty, "it is a guarantee of freedom for private conduct that the State may not abridge." *Id. at 112*. Thus, the Court held, the company could enforce its NLRA rights via a *§ 1983* suit. Id.

Here, the text of the CDA itself tells all parties, including the State, not to treat a provider or user of an interactive computer service as the publisher of information posted by someone else. Moreover, it does so in mandatory terms. *47 U.S.C. § 230(c)(1)* and *(e)(3)*. Like the NLRA, the CDA has created a "free zone" protecting providers and users of interactive computer services from state action that would hold them accountable for information posted by others. Thus, under the reasoning of *Golden State Transit*, the CDA does impose a binding obligation on the defendants -- and confers a right that presumably can be enforced through *§ 1983*.

2. The CDA Confers Immunity from Inconsistent **[*11]** State Criminal Laws

The defendants also argue that the plaintiffs cannot state a claim under the CDA because it only provides immunity from civil, not criminal, liability. To determine the scope of the CDA, the Court must begin with the text of the statute. See, e.g., *BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004)* (statutory interpretation begins with the statutory text). Standing alone, *subsection (c)(1) of the CDA* is not helpful. It states that a provider of interactive computer services should not be "treated" as the publisher or speaker of information posted by others, but does not specify whether that prohibition refers to treatment in the civil and/or criminal contexts. When *subsection (c)(1)* is read in conjunction with *subsection (e)(3)*, however, the meaning of the statute becomes clear: no "cause of action" may be brought, and no "liability" may be imposed, under any state law that treats a provider of interactive computer services as the publisher or speaker of information provided by others.

The terms "liability" and "cause of action" encompass criminal as well as civil actions. Black's Law Dictionary defines **[*12]** "liability" as "the quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment." Black's Law Dictionary 932 (8th ed. 2004) (emphasis added). The term "cause of action" is more commonly used to refer to civil actions, but the United States Court of Appeals for the Third Circuit has referred to a criminal prosecution as a "cause of action" in at least two instances. See *Bartnicki v. Vopper, 200 F.3d 109, 114 (3d Cir. 1999)* (Federal Wiretapping Act creates civil and criminal causes of action); *Electronic Laboratory Supply Co. v. Cullen, 977 F.2d 798, 808 (3d Cir. 1992)* (referring to federal statutes that create both criminal and civil causes of action). The CDA does not contain any language that limits the terms "liability" or "cause of action" to the civil context.

When *subsection (e)* is examined as a whole, it becomes even more clear that *sub-subsection (e)(3)* gives interactive computer service providers immunity from state criminal laws that are inconsistent with the CDA. *Subsection (e)* is entitled "Effect on other laws." Sub-subsection (1) provides **[*13]** that nothing in the CDA shall be construed to impair the enforcement of certain federal statutes governing obscenity and the sexual exploitation of children, "or any other Federal criminal statute." *47 U.S.C. § 230(e)(1)* (emphasis added). In other words, *sub-subsection (1)* only states that federal criminal statutes will trump the CDA.

Statutes should be interpreted to give effect, if possible, to every clause and word. *Duncan v. Walker, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)* (internal quotations omitted). The defendants' interpretation of the CDA would render the word "Federal" in subsubsection (1) superfluous, in violation of this rule of statutory interpretation.

Moreover, if Congress had wanted state criminal statutes to trump the CDA as well, it knew how to say so. For example, sub-subsection (2) provides that nothing in the CDA shall be construed to limit or expand "any law pertaining to intellectual property." *47 U.S.C. § 230(e)(2)* (emphasis added). Sub-subsection (4) provides that nothing in the CDA shall be construed to limit the application of the ECPA "or any similar State law." *47 U.S.C. § 230(e)(4)* **[*14]** (emphasis added). If Congress had wanted all criminal statutes to trump the CDA, it could have written sub-subsection (1) to cover "any criminal statute" or "any similar State criminal statute." Instead, sub-subsection (1) is limited to federal criminal statutes. When Congress includes particular language in one provision of a statute but omits it in another, courts generally presume that Congress acted intentionally and purposefully. *Duncan, 533 U.S. at 173* (internal quotations omitted).

The defendants argue that the CDA allows for the operation of state criminal laws by relying on the first sentence of *subsection (e)(3)*, which provides that a state may enforce "any State law that is consistent with [the CDA]." This argument is inapposite because the plaintiffs' claim is that the enforcement of Pennsylvania's child pornography law against them is not consistent with the CDA, as they did not provide such pornography themselves.

Because the plain language of the CDA provides internet service providers immunity from inconsistent state criminal laws, the Court need not examine the statute's legislative history. See *BedRoc Ltd., LLC, 541 U.S. at 183* **[*15]** (statutory interpretation ends with the statutory text if the text is unambiguous). See also *City of Chicago v. EDF, 511 U.S. 328, 337, 114 S. Ct. 1588, 128 L. Ed. 2d 302 (1994)* (courts should not rely upon language in a committee report when that language is not used in the statute); *United States v. $ 8,221,877.16 in U.S. Currency, 330 F.3d 141, 160 (3d Cir. 2003)* ("[W]e are not persuaded to rethink our interpretation of the clear language in [the statute] on the basis of a few sentences in a Committee Report and the government's views as to Congress's motives.").

3. Plaintiffs Have Alleged a Violation of Their Right to Immunity Under the CDA

Having established that the CDA confers a *§ 1983*-enforceable right upon internet service providers and users to not be "treated" under state criminal laws as the publisher or speaker of information provided by someone else, the question remains: have the plaintiffs alleged a violation of that right? The complaint alleges that the defendants obtained and executed a warrant to seize the plaintiffs' servers and subscriber records, but does not allege that the defendants took any further action against the plaintiffs. **[*16]**

The Court is not certain that law enforcement officials "treat" an internet service provider as the publisher or speaker of information provided by others whenever they prepare or execute a search warrant against a provider. The Court cannot conclude at this time that the defendants here did not wrongly "treat" the plaintiffs, however. In their affidavit of probable cause, defendants Michelle Deery and Martin McDonough state that they believe that the plaintiffs violated certain state criminal laws against the possession and distribution of child pornography. (Search Warrant Applicat'n.) But the plaintiffs allege -- and the Court must accept as true -- that they did not provide any child pornography themselves. (See Compl. PP49.) Special Agent Deery and Detective McDonough's statement in the affidavit of probable cause thus raises a question of whether, in obtaining and executing the warrant, the defendants treated the plaintiffs as the publishers or speakers of information provided by others. The defendants have never fully addressed whether the plaintiffs may state a claim under the CDA based on the execution of a warrant alone.

4. Defendants Have Qualified Immunity from **[*17]** Damages

Although the Court finds that the plaintiffs have stated a *§ 1983* claim based on a violation of their right to immunity under the CDA, the defendants are entitled to qualified immunity from money damages on this claim because the right was not clearly established at the time of the alleged violation. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*. Official action is protected by qualified immunity unless the unlawfulness of the action is apparent in the light of pre-existing law. *Anderson v. Creighton, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).*

The parties have not identified, and the Court has not found, any cases extending the CDA's immunity provisions to state criminal laws. Considering the CDA's express purpose of encouraging the development and use of technologies that block obscene material, as well as the lack of case law regarding immunity from criminal **[*18]** liability, the Court finds that the alleged unlawfulness of the defendants' actions was not apparent in the light of pre-existing law.

The plaintiffs cite *Grant v. City of Pittsburgh, 98 F.3d 116 (3d Cir. 1996)* for the proposition that a district court should not make a determination regarding qualified immunity until the parties have had an opportunity to develop facts about the individual officers' alleged conduct. *Grant* is inapposite to the determination of qualified immunity on the plaintiffs' CDA claim. In Grant, the district court had concluded that the right at stake was clearly established. The Court of Appeals did not question that conclusion; it remanded so that the district court could determine if each defendant's actions violated that right. *Id. at 122-123*. Here, the Court has determined as a matter of law that a right to immunity from state criminal laws under the CDA was not clearly established. The defendants' particular actions are therefore irrelevant -- nothing they could have done would have violated a "clearly established" right under the CDA.

In sum, count II may go forward, but only to the extent that the plaintiffs **[*19]** have requested declaratory and injunctive relief.

B. Count III - Deprivation of Rights Under the Electronic Communications Privacy Act

The ECPA prohibits the unauthorized access of any "facility through which an electronic communication service is provided." *18 U.S.C. § 2701*. The ECPA permits a governmental entity, however, to obtain the contents of communications and subscriber records from internet service providers after obtaining an appropriate warrant, court order, or subpoena. *18 U.S.C. § 2703*. n6

> n6 The ECPA was enacted in 1986 as a comprehensive amendment to the federal wiretap law. Pub. L. No. 99-508, 100 Stat. 1848. The provisions of the ECPA at issue here are in Title II of the statute, *18 U.S.C. §§ 2701-11*, which is sometimes referred to as the Stored Wire and Electronic Communications and Transactional Records Access Act or the Stored Communications Act. The Court will adopt the parties' usage and refer to the statute in this Opinion as the ECPA.

[*20]

In count III of the complaint, the plaintiffs allege that the defendants violated their rights under the ECPA because they seized and accessed the plaintiffs' servers and subscriber records without securing a valid warrant. The defendants have moved to dismiss count III on the grounds that: 1) Congress has implicitly precluded the plaintiffs from enforcing the ECPA via *§ 1983* by giving the ECPA its own remedial scheme; and 2) the defendants acted pursuant to a valid warrant under the ECPA.

The Court finds that the ECPA's remedial scheme precludes *§ 1983* remedies. The comprehensive civil remedies provided by the ECPA, *18 U.S.C. § 2707(b)-(c)*, indicate that Congress intended these remedies to supplant relief under *§ 1983*. As the plaintiffs' *§ 1983* claims are preempted, the Court need not address the defendants' arguments about the validity of the warrant.

As noted above in section A.1, a plaintiff asserting a *§ 1983* claim based on a violation of a federal statute must show that the statute confers an enforceable right, privilege, or immunity within the meaning of *§ 1983*. *Wilder, 496 U.S. at 508*. Once a plaintiff makes this showing, there **[*21]** is a rebuttable presumption that the statutory right is enforceable under *§ 1983*. *Blessing v. Freestone, 520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997)*. A defendant may, in turn, rebut this presumption by demonstrating that Congress specifically foreclosed a remedy under *§ 1983*, either expressly in the statute itself, or implicitly by creating "a comprehensive enforcement scheme that is incompatible with individual enforcement under *§ 1983*." Id.

Here, the defendants do not dispute that the ECPA created an enforceable right within the meaning of *§ 1983*. Instead, the defendants argue that Congress implicitly precluded *§ 1983* remedies for violations of the ECPA by setting forth a comprehensive remedial scheme within the statute.

Whether a statutory enforcement scheme is sufficiently comprehensive to preclude the availability of *§ 1983* was most recently considered by the U.S. Supreme Court in *City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005)*. In that case, the plaintiff sought to bring a *§ 1983* claim to vindicate rights under the Telecommunications Act of 1996 ("TCA"), even though the TCA itself provided for private judicial **[*22]** enforcement of its provisions.

The Supreme Court began its analysis by noting that, because the express provision of one method of enforcement in a statute suggests Congress intended to preclude others, "[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under *§ 1983*." *Abrams, 544 U.S. at 121*.

The Supreme Court then reviewed its prior decisions on the preclusion of *§ 1983* claims and found that the dividing line between cases in which it had held that *§ 1983* was available and those in which it had held *§ 1983* precluded was "the existence of a more restrictive private remedy for statutory violations." Id. In cases where the Court had found *§ 1983* precluded, the statutes at issue contained comprehensive remedial schemes that were more restrictive than *§ 1983*, and the Court held those remedial schemes would be undermined if plaintiffs could circumvent them by resorting to broader remedies available under *§ 1983*. n7 In cases where the Court had found *§ 1983* available, the statutes at issue "did not provide a private judicial remedy (or, **[*23]** in most of the cases, even a private administrative remedy) for the rights violated." n8

n7 *Id.*, citing *Middlesex Cty. Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1, 14, 19-20, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981)* (holding that *§ 1983* actions were impliedly precluded by the comprehensive, but more restrictive, remedial scheme available under the Federal Water Pollution Control Act, which among other restrictions, required 60 day notice to potential defendants before filing suit); *Smith v. Robinson, 468 U.S. 992, 1011-1012, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984)* (holding that *§ 1983* claims were impliedly precluded by the more restrictive remedial scheme of the Education of the Handicapped Act, which included mandatory administrative proceedings and which did not allow for the recovery of attorneys' fees).

n8 Id. (emphasis in original omitted), citing *Blessing, 520 U.S. at 348* (finding *§ 1983* not precluded by a provision of Title IV because the statute "contain[ed] no private remedy -- either judicial or administrative -- through which aggrieved persons [could] seek redress"); *Livadas v. Bradshaw, 512 U.S. 107, 133-134, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994)* (finding *§ 1983* not precluded by the National Labor Relations Act because there was a "complete absence" in the Act of any provision for the relief requested); *Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 108-109, 110 S. Ct. 444, 107 L. Ed. 2d 420, (1989)* (finding *§ 1983* not precluded because there was no comprehensive enforcement scheme under the labor statutes at issue for the relief requested); *Wilder, 496 U.S. at 521* (finding *§ 1983* not precluded by the Medicaid Act because it "contain[ed] no ... provision for private judicial or administrative enforcement" comparable to those in cases where the Court had found *§ 1983* precluded); *Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 427, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987)* (finding *§ 1983* not precluded by the Housing Act because it did not contain a private judicial remedy).

[*24]

The Supreme Court specifically declined to hold, however, that the existence of a private judicial remedy, by itself, conclusively establishes a congressional intent to preclude *§ 1983* relief. Instead, the Court found that the "ordinary inference" that the existence of a comprehensive private remedy precluded *§ 1983* relief could be overcome "by textual indication, express or implicit, that the remedy is to complement, rather than supplant, *§ 1983*." *Id. at 123*.

Turning to the specifics of the TCA, the Supreme Court found that the statute's remedial scheme was comprehensive, but more restrictive, than relief under *§ 1983*. Although the TCA allowed plaintiffs a remedy against the government action at issue, its remedial scheme required plaintiffs to file suit within thirty days of an alleged violation and required courts to hear and decide cases on an expedited basis. In addition, the TCA did not allow for attorney's fees and did not clearly provide for compensatory damages. *Id. at 122-123*. The TCA therefore "adds no remedies to those available under *§ 1983*, and limits relief in ways that *§ 1983* does not." *Id. at 122*. Based on these facts, the Supreme Court held the **[*25]** TCA's more limited remedial scheme was inconsistent with, and therefore supplanted by, *§ 1983*. Id.

Evaluating the ECPA under the analysis set forth in *Abrams* reveals it to be significantly different from the TCA and the other statutes previously considered by the Supreme Court. Like the TCA and the statutes at issue in Sea Clammers and Smith, the other cases where the Supreme Court found *§ 1983* preempted, the ECPA has a comprehensive remedial scheme. Unlike the statutes in those cases, however, the remedies provided by the ECPA are not significantly more restrictive than those available under *§ 1983*, but are instead roughly equivalent.

The ECPA provides for all the remedies available under *§ 1983* -- declaratory relief, actual damages, attorney's fees and costs, and punitive damages for willful violations. *18 U.S.C. § 2707(b)-(c)*. Moreover, the ECPA provides for even greater relief than *§ 1983* in one respect: even if an ECPA plaintiff's actual damages are nominal, he is entitled to receive at least $ 1,000 in a successful suit. *18 U.S.C. § 2707(c)*. The procedures required by the ECPA are also no different from a **[*26]** *§ 1983* claim. Relief under the ECPA has no preconditions or restrictions like the 30 day time limit for filing suit under the TCA. Only with respect to the statute of limitations is an ECPA claim potentially more restrictive than a claim under *§ 1983*. The ECPA's statute of limitations is two years, *18 U.S.C. § 2707(f)*, but the statute of limitations for *§ 1983* depends on state law and may be as long as four years or more. n9

n9 In actions under *§ 1983*, federal courts apply states' statutes of limitations for personal injury. *Garvin v. City of Phila., 354 F.3d 215, 220 (3d Cir. 2003)*. For claims arising in states, such as Florida and New York, where statutes of limitations for personal injury are longer than two years, claims under the ECPA may be time-barred when claims under *§ 1983* are not. See, e.g., *Chappell v. Rich, 340 F.3d 1279 (11th Cir. 2003)* (Florida's four year statute of limitations applies to *§ 1983* claims). Conversely, in states where personal injury statutes of limitations are one year, like Tennessee, an ECPA claim will be available after a *§ 1983* claim has become time-barred. See, e.g., *Ling v. Herrod, 2006 U.S. Dist. LEXIS 53997, 2006 WL 2239101 at 2 (W.D. Tenn. Aug. 3, 2006)* (Tennessee's one year statute of limitations applies to *§ 1983* claims). Here, the plaintiffs' *§ 1983* claims are governed by Pennsylvania's two year statute of limitations, meaning that for this case, the statute of limitations for an ECPA claim and the plaintiffs' *§ 1983* claim is the same. See *Garvin, 354 F.3d at 220*.

[*27]

The issue here, then, is whether a statute like the ECPA, containing a comprehensive private judicial remedy roughly equivalent to that in *§ 1983*, can be considered to be inconsistent with *§ 1983* and therefore preempt it. Neither the submissions of the parties nor the Court's own research has identified any previous decisions addressing this situation.

To resolve the issue, the Court will apply the shifting presumptions set out in *Abrams*. The existence of a private judicial remedy in the ECPA does not conclusively establish that *§ 1983* is precluded, but it creates an "ordinary inference that the remedy provided in the statute is exclusive." *Abrams, 544 U.S. at 124*. This inference can be "overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, *§ 1983*." *Id. at 124*.

Here, nothing in the text of the ECPA implicitly or explicitly indicates that its remedial scheme is to complement rather than supplant *§ 1983*. The remedy available in the ECPA is complete, providing for the same spectrum of compensatory and exemplary damages, plus attorneys' fees and costs, as does *§ 1983*. The procedures for **[*28]** filing suit under the ECPA and under *§ 1983* are equivalent. As there is no significant difference between the remedies available under the two statutes, a litigant seeking to vindicate his rights under the ECPA has no need to resort to *§ 1983* and can obtain full and complete relief under the remedial provisions of the ECPA itself. Accordingly, the comprehensive remedial scheme in the ECPA can be fairly said to replace or supplant, rather than complement, the remedies available under *§ 1983*.

Additional support for this conclusion can be drawn from *ECPA § 2708* which states that: "[t]he remedies and sanctions described in this chapter [*ECPA §§ 2701-12*] are the only judicial remedies and sanctions for non-constitutional violations of this chapter." Although this language was enacted principally to ensure that violations of the ECPA would not be used as the basis for excluding evidence under the statutory exclusionary rule of *18 U.S.C. § 2515*, n10 its plain meaning would also seem to forbid violations of the ECPA from being used as the basis for claims under other federal laws, including *§ 1983*.

n10 Although the Senate Report accompanying the introduction of the ECPA contains no explanation of *§ 2708*, the Report does discuss essentially identical language in Title

> I of the ECPA, *18 U.S.C. § 2518(1)(c)*. The Report explains that this language was added at the request of the Justice Department to ensure that "[i]n the event that there is a violation of law of a constitutional magnitude, the court involved in a subsequent trial will apply the existing Constitutional law with respect to the exclusionary rule" and that the statutory exclusionary rule of Title II or the Omnibus Crime Control and Safe Streets Act of 1968 would not apply." S. Rep. No. 99-541, at 23, reprinted in 1986 U.S.C.C.A.N. at 3577 (1986).

[*29]

Under the analysis set out in *Abrams*, therefore, in the absence of any indication in the ECPA that Congress intended to allow resort to *§ 1983* as a complementary means of enforcing the statute, the Court is left with the "ordinary inference" that ECPA's comprehensive remedial provisions preclude *§ 1983* relief. Accordingly, Count III of the plaintiffs' complaint will be dismissed.

C. Count IV - Deprivation of Due Process (Based on Violation of the Internet Child Pornography Law)

Pennsylvania's Internet Child Pornography law ("ICPL") requires an internet service provider to remove or disable access to child pornography after the Attorney General obtains a court order and notifies the service provider. *18 Pa. C.S. §§ 7622-7628*. In count IV of the complaint, the plaintiffs argue that the defendants deprived them of due process by failing to follow the order application and notice procedure set forth in the ICPL. The Court will dismiss count IV because the defendants did not have a duty to follow the ICPL's procedures.

Pennsylvania has enacted at least two laws that concern child pornography. *Section 6312* of the Pennsylvania Crimes Code, enacted in 1977, makes it a crime to **[*30]** knowingly produce, possess, or distribute child pornography. *18 Pa. C.S. § 6312(b)-(d)* and Credits.

The ICPL, enacted in 2002, makes it a crime for an internet service provider to fail to:

> remove or disable access to child pornography items residing on or accessible through its service in a manner accessible to persons located within this Commonwealth within five business days of when the Internet service provider is notified by the Attorney General pursuant to *section 7628* (relating to notification procedure) that child pornography items reside on or are accessible through its service.

18 Pa. C.S. § 7622 and Credit; *18 Pa. C.S. § 7624* (setting forth the penalties for successive violations of *§ 7622*).

The ICPL further provides that: 1) the Attorney General or district attorney may apply to the court of common pleas for an order to remove or disable child pornography items; 2) the court may enter such an order ex parte; and 3) the Attorney General must notify the internet service provider within three days of receiving a copy of the order. *18 Pa. C.S. §§ 7626-7628*.

The plaintiffs have **[*31]** not alleged that the defendants have investigated or prosecuted them for possible violations of the ICPL. Instead, the plaintiffs have alleged, and the record shows, that the defendants seized the plaintiffs' servers to investigate possible violations of *18 Pa. C.S. § 6312*. The plaintiffs argue nevertheless that the defendants had a duty to follow the procedures set forth in the ICPL.

Neither the text of the ICPL or the principles of statutory construction support the plaintiffs' position. Nothing in the ICPL requires law enforcement officials to seek to remove or disable access to child pornography items. Nor does anything in the ICPL require officials to follow the procedures set forth in the ICPL when they are trying to enforce or investigate violations of other statutes.

A new statute, such as the ICPL, does not repeal or limit the enforcement of an older statute, such as *§ 6312*, unless the new statute explicitly so provides, or unless the two statutes are irreconcilable. See *United States v. Boffa, 688 F.2d 919, 932 (3d Cir. 1982)* ("A new statute will not be read as partially repealing a prior statute unless a 'positive repugnancy' **[*32]** exists between the two."); *In re Holton Estate, 399 Pa. 241, 159 A.2d 883, 886 (Pa. 1960)* ("Statutes are never presumed to make any innovation in the rules or principles of the common law or prior-existing law beyond what is expressly declared in their provisions.") (internal quotations omitted).

The ICPL does not contain any language expressly repealing or limiting the application of existing child pornography statutes. Nor are the ICPL and *§ 6312* irreconcilable; they criminalize different kinds of conduct. *Section 6312* makes it a crime for anyone to knowingly possess or distribute child pornography. The ICPL makes it a crime for an internet service provider to fail to remove or disable access to child pornography upon receiving notice of a court order to do so, whether or not the provider knew about the child pornography prior to the court order.

The plaintiffs point to *§ 7623 of the ICPL*, which provides that "[n]othing in [the ICPL] may be construed as imposing a duty on an Internet service provider to actively monitor its service or affirmatively seek evidence of illegal activity on its service," to support their argument that they cannot be the subject **[*33]** of a search warrant investigating possible violations of *18 Pa. C.S. § 6312*. But the fact that an internet service provider does not have a duty to monitor its service for child pornography does not mean that it cannot be held liable if it actually knowingly disseminates child pornography. Nor does it mean that an internet service provider cannot be searched for evidence of crimes committed by other people.

Because the Court is dismissing the plaintiffs' ICPL claim on the ground that the defendants did not have a duty to follow the ICPL's procedures, the Court will not address the defendants' alternate grounds for dismissal, that a violation of the ICPL does not give rise to a due process claim under *§ 1983*.

D. Count V - Deprivation of Due Process by Attorney General Defendants (Based on Violation of the Commonwealth Attorneys Act)

In count V of the complaint, the plaintiffs allege that defendants Thomas W. Corbett, Jr., the Attorney General of the Commonwealth of Pennsylvania, and Michele L. Deery, a Special Agent of the Office of Attorney General, (hereinafter the "Attorney General Defendants") investigated the plaintiffs even though they were not **[*34]** authorized to do so under the Commonwealth Attorneys Act, *71 Pa. C.S. § 732-101, et seq.* (hereinafter the "Attorneys Act"). The Attorney General Defendants have moved to dismiss count V on the grounds that they were authorized to investigate, and that even if they were not, a violation of the Attorneys Act does not give rise to a *§ 1983* claim.

The Attorneys Act provides, in relevant part, that the Attorney General shall have the authority to investigate and prosecute any matter "[u]pon the request of a district attorney who lacks the resources to conduct an adequate investigation or the prosecution of the criminal case or matter." *71 Pa. C.S. § 732-205(a)(3)* (regarding prosecutions); *71 Pa. C.S. § 732-206(a)* (regarding investigations). The parties dispute whether the Attorney General Defendants acted pursuant to a proper request from a district attorney in this matter.

Even if the Court assumes that the Attorney General Defendants acted without a proper request and thereby violated the Attorneys Act, the Court will dismiss count V because: 1) to the extent the plaintiffs are asserting **[*35]** a right to the uninterrupted possession of their equipment and records, that claim is more properly analyzed under, and is subsumed by, the unreasonable search and seizure claim in count VI; and 2) the plaintiffs do not otherwise have a constitutionally protected liberty or property interest in the Attorney General Defendants' compliance with the Attorneys Act.

The violation of a state statute does not, in itself, provide a basis for a *§ 1983* claim. *West, 487 U.S. at 48* (*Section 1983* plaintiffs must allege the violation of a right protected by the Constitution or a federal statute); *Benn v. Universal Health Sys., Inc., 371 F.3d 165, 174 (3d Cir. 2004)* ("*Section 1983* does not provide a cause of action for violations of state statutes."). The violation of a state law only gives rise to a *§ 1983* claim if the violation implicates a constitutional right. Here, the plaintiffs claim that the Attorney General Defendants' violation of the Attorneys Act violated their right to due process under the *Fourth* and *Fourteenth Amendments*.

At the outset, the Court notes that the *Fourth Amendment* confers a right to be free from unreasonable searches and seizures; **[*36]** it does not address "due process" as such. To the extent that the plaintiffs are arguing that the Attorney General Defendants' alleged violations of the Attorneys Act deprived them of their right to be free from unreasonable search and seizure, the plaintiffs' claim must be analyzed under the *Fourth Amendment*. See *Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)* (where "the *Fourth Amendment* provides an explicit textual source of constitutional protection against [the governmental conduct in question], that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing" the claim); *Doe v. Groody, 361 F.3d 232, 238 n. 3 (3d Cir. 2004)* (same).

Where, as here, the defendants acted pursuant to a search warrant, the relevant *Fourth Amendment* questions are whether the warrant was sufficiently particular and supported by probable cause, and whether it was objectively reasonable for the defendants to rely on the warrant. Count VI of the complaint raises precisely these questions. The Court will dismiss the plaintiffs' *Fourth Amendment*-based claims in count V because they are subsumed by count VI. n11 **[*37]**

n11 The Court will allow the *Fourth Amendment* claim to go forward for the reasons stated in the following section. To guide the parties in any continued litigation, however, the Court notes here that a violation of the Attorneys Act does not constitute a per se violation of the *Fourth Amendment*. In *Commonwealth v. Goodman, 347 Pa. Super. 403, 500 A.2d 1117 (Pa. Super. 1985)* (en banc), the Pennsylvania Superior Court found that the Attorney General's office had conducted an unauthorized investigation in violation of the Attorneys Act. The court held nevertheless that the investigation did not violate the *Fourth Amendment*, and that evidence obtained from the investigation need not be suppressed. *Id. at 1129-31*.

In addition, several Courts of Appeals have held that law enforcement officials acting beyond the scope of their authority under state law do not necessarily violate the *Fourth Amendment*. See, e.g., *Guest v. Leis, 255 F.3d 325, 334 (6th Cir. 2001)* (search and seizure by officers acting outside their jurisdiction under state law did not violate the *Fourth Amendment*); *United States v. Mikulski, 317 F.3d 1228, 1233 (10th Cir. 2003)* (officers' "apparent violation of state law" in making an arrest outside their jurisdiction did not amount to a federal violation); *Pasiewicz v. Lake County Forest Preserve District, 270 F.3d 520, 526-527 (7th Cir. 2001)* (although a "blatant disregard of state law and the chain of command could weigh on the scales of reasonableness," officers' extraterritorial arrest in violation of state law was not per se unreasonable under the *Fourth Amendment*); *Abbott v. City of Crocker, 30 F.3d 994, 998 (8th Cir. 1994)* (same). The Court is persuaded by these decisions that a violation of the Attorneys Act does not automatically constitute a violation of the *Fourth Amendment*.

[*38]

To the extent that the plaintiffs are arguing that they have a right -- apart from any *Fourth Amendment* right -- to have the Attorney General Defendants comply with the Attorneys Act, the plaintiffs' claim fails. The *Fourteenth Amendment* prohibits deprivations of liberty and property without due process of law. *U.S. Const. amend. XIV*. But the expectation of receiving a certain process under state law is not, without more, a liberty interest protected by the Due Process Clause. *Olim v. Wakinekona, 461 U.S. 238, 251, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983)*.

In *United States v. Jiles, 658 F.2d 194 (3d Cir. 1981)*, cited with approval in Olim, the United States Court of Appeals for the Third Circuit considered whether a Pennsylvania statute prohibiting law enforcement officers from releasing a defendant's juvenile records to other law enforcement officials without a court order created a substantive property or liberty interest on the defendant's behalf. To answer that question, the court had to "ascertain whether the state law directly conferred a substantive right on the defendant or merely created an administrative plan to help the state regulate its officers' **[*39]** conduct." *Id. at 200*. The court found that the statute created a procedure to protect juveniles from having their records released to the public, but did not create any protectible interests in the defendant because law enforcement agencies were meant to have access to the records. Id.

Here, the Court finds that the Attorneys Act also "merely created an administrative plan to help the state regulate its officers' conduct." The Act does not expressly provide for any cause of action in the event of a violation. It does not protect persons from being investigated or prosecuted by the Attorney General. See *Goodman, 500 A.2d at 1129-1130* ("[T]he intention of the General Assembly in enacting the [Attorneys Act] was to allocate the prosecutorial powers, and thereby the investigatory powers, of the Commonwealth between the elected Attorney General and the individual, elected district attorneys. Nothing in the statute itself or in its available legislative history indicates that the General Assembly considered the Act would in any way involve the protection of the constitutional rights of criminal defendants.") (internal citations omitted). Because **[*40]** the Attorneys Act does not create a protectible liberty or property interest, the plaintiffs cannot state a due process claim based on the Attorney General Defendants' alleged noncompliance with the Act.

E. Count VI - Unreasonable Search and Seizure

Finally, the defendants have moved to dismiss the *Fourth Amendment* claim in count VI on the basis that they reasonably relied on a duly-issued search warrant. The plaintiffs challenge the validity of the warrant on a number of grounds. The plaintiffs allege that: 1) certain defendants made material misstatements in, and omitted material information from, the warrant application; 2) the warrant was overbroad, in violation of the *First Amendment*; 3) the defendants exceeded the scope of the warrant when executing it; and 4) the defendants' actions in obtaining and executing the warrant violated the plaintiffs' statutory rights. The Court concludes that a decision on these issues would be premature, and will deny the motion without prejudice.

In moving to dismiss count VI, the defendants do not fully address the *First Amendment* implications of the *Fourth Amendment* claim. Nor do the defendants move to dismiss the *First Amendment* claim **[*41]** in count I. This is a sufficient reason to deny the motion as premature. Although the Supreme Court has held that the same probable cause standard applies to all searches, the Court has also stated that the constitutionality of the seizure of presumptively protected materials cannot be analyzed without reference to the *First Amendment*. Compare *New York v. P.J. Video, Inc., 475 U.S. 868, 875, 106 S. Ct. 1610, 89 L. Ed. 2d 871 and n. 6 (1986)* and *Zurcher v. Stanford Daily, 436 U.S. 547, 564-565, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978)* with *Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 63-64, 109 S. Ct. 916, 103 L. Ed. 2d 34 (1989)* ("[W]hile the general rule under the *Fourth Amendment* is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause . . . it is otherwise when materials presumptively protected by the *First Amendment* are involved. It is the risk of prior restraint, which is the underlying basis for the special *Fourth Amendment* protections accorded searches for and seizure of *First Amendment* materials that motivates this rule.") (internal citations and quotations omitted).

In addition, it is too early to conclude as a matter **[*42]** of law that the warrant and its execution complied with the more traditional reasonableness requirements of the *Fourth Amendment*.

As to qualified immunity, it is correct that a law enforcement officer may rely on a duly issued search warrant, unless it is objectively unreasonable for him to do so. Considering the facts alleged in the complaint in the light most favorable to the plaintiffs, however, the plaintiffs have stated the claim that a reasonable officer in each of the defendants' positions would have known that the warrant was unconstitutional.

An appropriate Order follows.

ORDER

AND NOW, this 30th day of August, 2006, upon consideration of the defendants' Motion to Dismiss Counts II though VII of the Complaint (Doc. No. 59), the plaintiffs' opposition, and the parties' post-oral argument briefs, and after an oral argument on January 27, 2006, IT IS HEREBY ORDERED that the motion is GRANTED IN PART and DENIED IN PART for the reasons set out in the accompanying Memorandum.

The Motion is GRANTED as to Counts III, IV, and V, and as to Count II to the extent it seeks monetary relief. The Motion is DENIED as to Count VI, and as to Count II to the extent it seeks declaratory **[*43]** or injunctive relief. n1

n1 Count VII of the complaint was voluntarily dismissed by the plaintiffs.

BY THE COURT:

/s/ Mary A. McLaughlin, J.